

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149 ²

October Term, 1990

Supreme Ct.
FILED

OCT 23 1990

JOSEPH F. SPANOL, JR.
CLERK

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

RESPONDENT'S BRIEF IN OPPOSITION

PROOF OF SERVICE

MARK H. MAGIDSON (P25581)
Attorney for Respondent
2110 Penobscot Building
Detroit, MI 48226
(313) 963-4311

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.

**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

The Respondent, Nolan K. Lucas, who had been on bond pending this appeal, is now incarcerated in the Dekalb County Jail in Decatur, Georgia, asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the Michigan Court of Appeals (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's Affidavit in Support of this Motion is attached hereto.

Respectfully submitted,

BY: 

MARK H. MAGIDSON (P25581)
Attorney for Respondent
2110 Penobscot Building
Detroit, MI 48226
(313) 963-4311

Dated: October 22, 1990

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____, Term, 19____

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

v

NOLAN LUCAS

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Nolan Lucas, being duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes _____ No ☒

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

SEPTEMBER 4, 1990 - \$350.00 PR. WEEK

2. Have you received within the past twelve months any income from any of the following sources?

a. Business, profession or form of self-employment?

Yes ☒ No _____

b. Rent payments, interest or dividends?

Yes _____ No ☒

c. Pensions, annuities or life insurance payments?

Yes ☒ No _____ VA DISABILITY
144.00 PR. mo.

d. Gifts or inheritances?

Yes _____ No ☒

e. Any other sources?

Yes _____ No ☒

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

VA DISABILITY - 144.00 PR. mo.

3. Do you own any cash or checking or savings account?

Yes _____ No ✓ - Include any funds in prison accounts.

If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (excluding ordinary household furnishings and clothing)

Yes _____ No ✓

If the answer is yes, describe the property and state its approximate value.

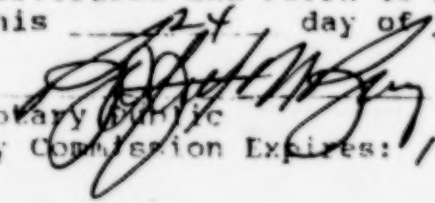
5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.


NOLAN LUCAS

Subscribed and sworn to before me
this 24 day of October, 1990.


Notary Public
My Commission Expires: 11-15-92

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

MARK H. MAGIDSON (P25581)
Attorney for Respondent
2110 Penobscot Building
Detroit, MI 48226
(313) 963-4311

TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	ii
QUESTIONS PRESENTED.....	iii
STATEMENT OF FACTS.....	1
ARGUMENT:	
I. THE MICHIGAN COURT OF APPEALS RELIED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS IN FINDING THE NOTICE PROVISION OF THE RAPE SHIELD LAW UNCONSTITUTIONAL, AND FURTHER, THE GROUNDS FOR THE DECISION ARE NARROW AND LIMITED TO THE FACTS OF THIS PARTICULAR TYPE OF CASE, THEREBY DEPRIVING THE SUPREME COURT OF JURISDICTION IN THIS MATTER.....	4
CONCLUSION.....	9

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Fay v Noria</u> , 372 US 391, 9 L Ed 2d 837, 83 S Ct 822 (1963).....	9
<u>Fox Film Corp. v Muller</u> , 296 US 207, 210, 80 L Ed 158 56 S Ct 183 (1935).....	9
<u>Herb v Pitcarin</u> , 324 US 117, 89 L Ed 789, 65 S Ct 459 (1945)	9
<u>Michigan v Long</u> , 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469 (1983).....	9
<u>People v Hackett</u> , 421 Mich 338, 365 NW2d 120 (1984).....	6
<u>People v Kahn</u> , 80 Mich App 605, 264 NW2d 360 (1978).....	6
<u>People v Lucas</u> , 160 Mich App 692, 408 NW2d 431 (1987).....	3
<u>People v Perkins</u> , 424 Mich 302, 375 NW2d 390 (1986).....	7
<u>People v Williams</u> , 95 Mich App 1, 289 NW2d 863 (1980) <u>rev'd on other grds</u> , 416 Mich 25 (1982).....	4,5 8
<u>Statutes</u>	
MCL 750.520(d); MSA 28.788(4).....	1
MCL 750.520(j); MSA 28.788(1).....	3, 6

COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether the Michigan Court of Appeals relied on adequate and independent state grounds in finding the rape shield law of Michigan unconstitutional as it is applied to the specific facts of a complainant and defendant having had previous sexual encounters, thereby depriving the U.S. Supreme Court of jurisdiction in this matter.

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.

MARK H. MAGIDSON (P25581)
Attorney for Respondent
2110 Penobscot Building
Detroit, MI 48226
(313) 963-4311

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF FACTS

Respondent, Nolan K. Lucas was convicted of two counts of third degree criminal sexual conduct, MCL 750.520(d); MSA 28.788(4). On July 2, 1985, Respondent was sentenced to a term of 44 to 180 months.

On August 31, 1984, Wanda Brown, the complaining witness in this matter and Nolan K. Lucas were "boyfriend and girlfriend" and had been dating each other for six or seven months. The testimony at trial and at the preliminary examination revealed that Ms. Brown and Mr. Lucas both lived on the same street, Rhode Island in the City of Highland Park, Michigan and that they lived only a couple of blocks from one another. Ms. Brown visited Mr. Lucas in his house four or five

times per week during the entire course of their relationship and saw each other every day. According to the testimony, during the course of their relationship, Ms. Brown visited Mr. Lucas' home over 100 times. At the preliminary examination, Ms. Brown stated that she and the Respondent had sex over 100 times. Further, she testified at the preliminary examination in this matter that the parties engaged in both "conventional, straight penal-vaginal sex as well as oral sex at different times". According to Ms. Brown, the parties had a serious relationship and talked about marrying one another.

At the time of the incident, Ms. Brown testified that she decided to walk to the store to purchase cigarettes at approximately 10:00 p.m. According to her testimony, she was walking alone that night by Mr. Lucas' home and he called to her. Ms. Brown testified that Mr. Lucas grabbed her arm, showed her a knife and told her she was coming with him to his house.

Once in the house, Ms. Brown testified that Mr. Lucas forced her to disrobe, poured drinks for the two of them and then forced to perform various sexual acts, including oral and vaginal sex. Ms. Brown stayed in the house with Mr. Lucas for approximately 24 hours. During this 24 hours, Mr. Lucas left Ms. Brown alone at least three different times when he went to the cellar for more wine. Thereafter, according to Ms. Brown's testimony, the parties went to sleep on a sofa couch. They awoke the following morning at approximately 10:00 a.m.

During this period, Ms. Brown stated that Mr. Lucas was very angry regarding a person named "Ricky" whom the Respondent

suspected of being Ms. Brown's new lover. She testified that after Mr. Lucas poured them wine, he asked her what was going on between her and Ricky.

Mr. Lucas testified on his behalf and confirmed that the parties had a very close relationship and that he had considered marrying the complainant. Mr. Lucas admitted to having seen Ms. Brown on August 31, 1984 and that they did in fact have sexual intercourse. His defense to this matter was consent.

Mr. Lucas initially had retained counsel to represent him in this matter, however, according to the Court records, the arraignment on the information was held on October 25, 1984 and on November 8, 1984, his retained counsel withdrew. On February 8, 1985, the trial court appointed an attorney to represent Mr. Lucas. At trial, which commenced on May 14, 1985, Mr. Lucas' trial attorney made a motion to allow evidence and testimony of the parties' prior sexual intercourse. In denying the motion, the trial court stated that the motion should have been filed within ten days of the arraignment on the information as required by MCLA 750.520(j); MSA 28.788(10), which is known as the rape shield law. This statute requires that upon motion, the court can hold an in camera hearing to determine the admissibility of said evidence where the motion is made within ten days of the arraignment on the information.

The defendant appealed his conviction as of right and his convictions were reversed by the Michigan Court of Appeals. People v Lucas, 160 Mich App 692, 408 NW2d 431 (1987).

Thereafter, the People applied to the Michigan Supreme Court for review and the matter was remanded to the Court of Appeals to determine whether the trial court's denial of the defendant's motion to introduce evidence regarding past sexual relations between the harmless beyond a reasonable doubt. In an Order and Opinion dated March 7, 1990, the Michigan Court of Appeals reviewed the entire record and determined that since the question of prior sexual relations between these individuals goes to the issue of credibility and since credibility was central to the case, the Court "cannot say exclusion of defendant's proposed testimony was harmless beyond a reasonable doubt". In an Order dated June 5, 1990 the Michigan Supreme Court denied further application for leave because "We are not persuaded that the questions presented should be reviewed by this Court".

REASONS FOR DENYING THE WRIT

- I. THE MICHIGAN COURT OF APPEALS RELIED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS IN FINDING THE NOTICE PROVISION OF THE RAPE SHIELD LAW UNCONSTITUTIONAL, AND FURTHER, THE GROUNDS FOR THE DECISION ARE NARROW AND LIMITED TO THE FACTS OF THIS PARTICULAR TYPE OF CASE, THEREBY DEPRIVING THE SUPREME COURT OF JURISDICTION IN THIS MATTER.

The Michigan Court of Appeals in reversing the trial court relied upon existing adequate state law in reversing the trial court. Further, the basis for the Michigan Court of Appeals decision was limited to very narrow and specific facts.

The Court of Appeals relied upon another Michigan Court of Appeals case in the initial decision in this matter. The Michigan Court of Appeals relied upon People v Williams, 95 Mich

App 1, 289 NW2d 863 (1980), rev'd on other grds, 416 Mich 25 (1982). The Williams court found the ten day notice provision unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant. The Michigan Court of Appeals in the instant case cited with approval the language contained in Williams as follows:

The object behind the imposition of a notice requirement is to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial. This rationale is sound when applied to notices of alibi and insanity defenses. It loses its logical underpinnings however, when applied to the instant situation. As stated, the very nature of the evidence sought to be presented, i.e., prior instances of sexual conduct between a complainant and a co-defendant, is personal between the parties. As such, it does not involve a subject matter that requires further witnesses to develop. An in camera hearing will necessarily focus on a complainant's word against the word of a co-defendant. Requiring notice in this situation, then, would serve no useful purposes. There would be no witnesses to investigate and, thus, no necessity for preparation time. ...this ten-day notice provision loses its constitutional validity when applied to preclude evidence of previous relations between the complainant and a defendant.

People v Williams, supra, 9-11.

In this matter, a state court is simply in effect deciding an evidentiary question. As has been noted throughout the record, this is a case of a "boyfriend/girlfriend situation". The parties had been intimate for several months. The defendant's defense at trial was consent. There was evidence that they had recently broken up. The credibility of each witness was central in this matter. Without the trial counsel having the ability to inquire regarding the prior relationship

between these same parties, the defendant was irreparably prejudiced. Further, in addition to the question of consent, inquiry into the prior relationship was important for the reason that it could have helped to establish a motive for the complainant to make false statements against the defendant.

The courts in Michigan have consistently interpreted the validity of the "rape shield law". The Respondent acknowledges that prior decisions in Michigan have upheld the constitutionality of the restrictive evidence provisions contained in MCL 750.520(j) as it pertained to evidence of prior sexual relations between a complainant and third parties. People v Hackett, 421 Mich 338, 365 NW2d 120 (1984); People v Kahn, 80 Mich App 605, 264 NW2d 360 (1978). Further, Respondent acknowledges the laudatory purpose of the rape shield law which was designed to encourage the reporting of sexual assaults, to protect the privacy rights of the complainant and to prevent harassment and humiliation of the complainant on the witness stand. People v Kahn, supra. However, these are state issues with state purposes and have been decided in a manner consistent with state law in this matter.

Here, Respondent Lucas sought to cross examine complainant regarding the lengthy and frequent sexual relationship. This is different than the other cases which have upheld the constitutionality of the rape shield statute. In the other cases, such as People v Hackett, the issue concerned the victim's prior sexual conduct with persons other than the defendant. Here, defendant Lucas did not want to introduce this

evidence to show poor character or bad reputation of the complainant. Rather, Lucas sought to cross examine the complainant on this issue to show bias or ulterior motive or a motive for making a false accusation to the police.

In fact, Michigan courts, including the Supreme Court has consistently followed the same principle as the Court of Appeals concluded in Williams. For instance, in People v Perkins, 424 Mich 302, 375 NW2d 390 (1986), the Michigan Supreme Court held that the interest sought to be protected by the rape shield law are not involved where the proposed testimony relates to the sexual activity between the complainant and the defendant. In Perkins, the defendant sought to introduce evidence of a previous sexual encounter between him and the complainant to show a pattern of sexual activity. The trial court found that not to allow the defendant to testify would deprive him of his defense of consent. The Supreme Court concluded that inquiry into the prior sexual relationship between the parties, "is material to the issue of consent and more probative than prejudicial and the testimony should come in for that purpose". Id 305. The court in Perkins concluded that if a fact finder were to believe the defendant's description of the encounter of a previous sexual relationship, then that evidence could influence the fact finder's decision regarding whether the act complained of was an assault or consensual.

Here, the Michigan courts have been deciding the Michigan statute and interpreting its requirements for many years. Michigan courts are familiar with the purpose of Michigan

rape shield law. The Michigan courts were familiar with the purpose of having a ten-day notice requirement in that it would enable a prosecutor to locate other potential witnesses, if, after an in camera hearing, the trial judge was going to permit such evidence. However, as the court correctly analyzed in Williams, and which the court in the instant case concurred, no real purpose exists where the only witness is the complainant herself. There would be no other witnesses to interview and there would no unfair surprise to the prosecutor since it is the prosecutor who was familiar with the testimony of the complainant.

Not only have the Michigan courts interpreted the Michigan law, but this is a very narrow issue. This is not a complete overruling of the rape shield law; on the contrary, it is merely a simple evidentiary matter that has been resolved. The issue is very narrow and the facts are very specific. The Michigan courts have concluded that where the parties were once intimate, then there is no logic to have a ten-day notice requirement, and, inquiry into the prior sexual relationship would be more probative than prejudicial. These are the same basic evidentiary issues that are faced by trial courts and state appellate courts in almost every trial. These are not the type of issues that are considered by the U.S. Supreme Court. The Petitioner's attempt in this matter to convert a case decided on state evidentiary law into federal constitutional law must fail.

This court does not have jurisdiction where the decision below is based on adequate and independent state

grounds. In fact, this court held in Herb v Pitcarin, 324 US 117, 89 L Ed 789, 65 S Ct 459 (1945) that the Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. This principle was reaffirmed in Fay v Noria, 372 US 391, 9 L Ed 2d 837, 83 S Ct 822 (1963).

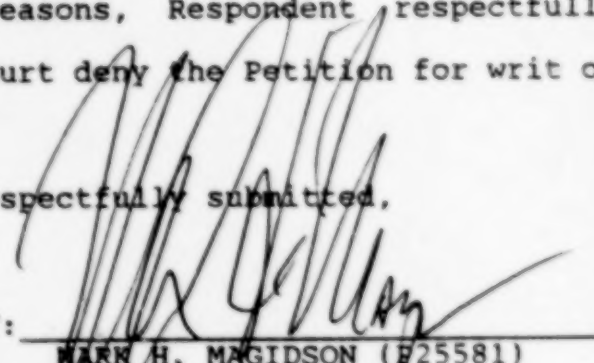
Even where the judgment of a state court rests upon two grounds, one which is federal and the other non-federal, jurisdiction fails if the non-federal ground is independent and adequate. Fox Film Corp. v Muller, 296 US 207, 210, 80 L Ed 158, 56 S Ct 183 (1935). In the instant case, the Michigan Court of Appeals relied upon prior state Supreme Court interpretations and decisions. Therefore, jurisdiction in this Court does not lie. Michigan v Long, 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469 (1983). Accordingly, the People's Petition must be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for writ of certiorari.

Respectfully submitted,

BY:


MARK H. MAGIDSON (F25581)
Attorney for Respondent
2110 Penobscot Building
Detroit, MI 48226
(313) 963-4311

Dated: October 22, 1990

IN THE SUPREME COURT OF THE UNITED STATES

No. 90-149

October Term, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

NOLAN K. LUCAS,

Respondent.

PROOF OF SERVICE

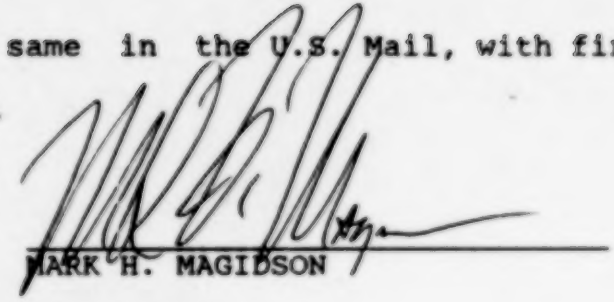
STATE OF MICHIGAN)
)SS.
COUNTY OF WAYNE)

After first having been duly sworn, Mark H. Magidson deposes and says that on the 23rd day of October, 1990 he served On Petition for Writ of Certiorari to the Michigan Court of Appeals, Motion for Leave to Proceed in Forma Pauperis, Affidavit in Support of Motion to Proceed in Forma Pauperis, and Respondent's Brief in Opposition upon:

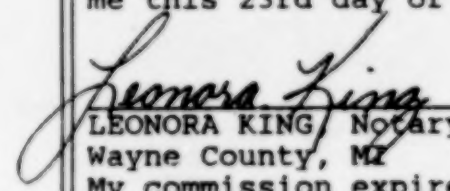
Timothy Baughman, Esq.
Chief of Criminal Division, Research
Training and Appeals
1441 St. Antoine, 12th Floor
Detroit, MI 48226

by enclosing said documents in an envelope addressed as set forth

above and depositing same in the U.S. Mail, with first class postage prepaid thereon.


MARK H. MAGIDSON

Subscribed and sworn to before
me this 23rd day of October, 1990.


LEONORA KING, Notary Public
Wayne County, MI
My commission expires: 11/2/92